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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

RUDOLPH G. (BUTCH) STANKO and
GARY WADERICH,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether defendants in a criminal case can be held vicariously liable for felony charges when they did not personally participate in the acts charged in the indictment.

Whether a local rule of the District Court prohibiting lawyers for the defendants from interviewing jurors after the trial is constitutional.

Whether the defendants in a criminal trial have a right to a change of venue in a highly publicized case wherein an independent survey concluded that 80% of the potential jurors polled had formed an opinion that the defendants were guilty.

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PETITION FOR WRIT OF CERTIORARI

Rudolph G. (Butch) Stanko and Gary Waderich respectfully pray that a Writ of Certiorari be issued to review the judgment of Tenth Circuit Court of Appeals entered in this case on June 6 and July 2, 1986.

OPINIONS BELOW

This case was decided by a panel of the United States Court of Appeals for the Tenth Circuit on June 6, 1986 in an opinion designed for publication. The opinion is reproduced as Appendix "A". A petition for rehearing with suggestion for rehearing *en banc* was denied on July 2, 1986 without further opinion.

———o———

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 6, 1986 and the petition for rehearing with suggestion for rehearing *en banc* was denied on July 2. 1986.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

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QUESTIONS PRESENTED

Whether defendants in a criminal case can be held vicariously liable for felony charges when they did not personally participate in the acts charged in the indictment.

Whether a local rule of the District Court prohibiting lawyers for the defendants from interviewing jurors after the trial is constitutional.

Whether the defendants in a criminal trial have a right to a change of venue in a highly publicized case

wherein an independent survey concluded that 80% of the potential jurors polled had formed an opinion that the defendants were guilty.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States as follows:

First Amendment—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

———o———

STATEMENT OF THE CASE

Petitioners were charged in a fifteen count indictment alleging various felony violations of the Federal Meat Inspection Act, 21 U.S.C. §§ 601-624, 661-680. Prior to trial eight of the counts were voluntarily dismissed by the government. In a joint trial to a jury, Stanko and Waderich were convicted of all seven remaining counts. Stanko was sentenced to serve six years in the custody of the Attorney General. Waderich received a fifteen month jail sentence. The Petitioners requested a stay of sentencing pending the filing of this Petition for Certiorari. The stay was denied by the Tenth Circuit and both Petitioners are currently incarcerated.

On June 6, 1986, the United States Court of Appeals for the Tenth Circuit issued an opinion holding that the Petitioners could be held vicariously liable for felony charges even though they did not personally participate in the acts charged in the indictment. Further, the Court of Appeals held that the defendants were not entitled to a change of venue despite the fact that an independent pretrial survey of potential jurors demonstrated that eighty percent (80%) of them had formed an opinion that the Defendants were guilty. Finally, the Court failed to address the constitutionality of a local rule of the District Court

that prohibited defense attorneys from interviewing the jurors after the trial. Defense counsel sought the interviews after receiving a letter from one juror expressing concern about the verdict and hearing press reports that at least one juror had given false answers about his qualifications.

The Court of Appeals decision found the defendants' arguments to be "trivial matters" and concluded there was no "actual prejudice". The judgment was affirmed on all counts.

REASONS FOR GRANTING THE WRIT

I. THE COURT ERRED IN APPROVING A VICARIOUS LIABILITY INSTRUCTION FOR A FELONY OFFENSE.

This case represents the first reported decision wherein any defendant has been held vicariously liable for felony offenses based upon acts charged in the indictment that were actually committed by other employees. In its decision the Court of Appeals interprets previous decisions of this Court in *United States v. Park*, 421 U.S. 658 (1975) and *United States v. Dotterweich*, 320 U.S. 277 (1943) to be applicable to felony prosecutions. In fact, those cases stand for the principle that a defendant may only be held vicariously liable for misdemeanor criminal conduct. Nothing in this Court's previous decisions approved the use of instructions to the jury that a defendant can be held vicariously responsible for alleged felony criminal conduct.

The Tenth Circuit opinion states: "There is nothing in the *Park* decision limiting its scope to misdemeanors." In so ruling the Tenth Circuit ignores a fundamental principle of criminal law. That is, no defendant can be found guilty of felony crime absent proof of individual criminal intent. Furthermore, there can be no felony liability without a specific intent to defraud.

When neither the statute nor its legislative history is clear as to the scienter requirement of a criminal statute, it is necessary to turn to the general principles of the common law. *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. Anton*, 683 F.2d 1011 (7th Cir. 1982). It is a basic principle of our criminal law that a crime consist of the union of a guilty act and a guilty mind. In *Morrisette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), Justice Jackson eloquently stated the fundamentals of this proposition:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. (342 U.S. at 250)

Therefore, in order to obtain a lawful felony conviction under 21 U.S.C. § 676, it was incumbent upon the government to prove beyond a reasonable doubt that Rudolph G. Stanko personally, with an intent to defraud, intentionally distributed meat which he knew to be adulterated. Instruction 42 given by the Trial Court in this case failed to comport with the statutory requirements. As clearly as the Court expressed the law that intent was required to be found before a defendant could be guilty on each

count, it expressed the view, in Instruction 42[1] that such was not required with respect to Defendant Stanko.

Instruction 42 provided in essence that Mr. Stanko could be found guilty on each and every count of the indictment on the basis of nothing more than a finding that he held a responsible relationship to the issues out of which the charges arose.

---

[1] In Instruction No. 42, the Trial Court told the jurors the following:

> If you find beyond a reasonable doubt the Defendant, Rudolph Stanko, was tne owner of Cattle King Packing Company, and the acts alleged in the indictment were done by agents of the business in the regular course of their duties, and that the other elements of the offense as defined in these instructions have been established beyond a reasonable doubt, then you may find the Defendant Stanko guilty even though he did not personally perform the acts resulting in violation of the law.
>
> Although you need not find the Defendant Stanko personally participated in the acts charged in the indictment, in order to find the Defendant Stanko guilty, you must find, beyond a reasonable doubt, by virtue of his position in Cattle King Packing Company, had a position of authority and a responsible relationship in the situation out of which these charges arose, and the ability to have prevented the acts.
>
> However, you are further instructed that you may not find the Defendant Stanko guilty merely on the basis of his ownership of the Cattle King Packing Company.
>
> You are further instructed that you, of course, may not find the Defendant Stanko guilty unless you find beyond a reasonable doubt every element of the offense as defined in these instructions, as referring to a specific count, was committed by some person or persons.
>
> In addition, as you have been instructed before, each count must be considered separately. (Tr. 2034-35)

Counsel objected to this instruction on the ground that such instructions may only be given, if at all, in misdemeanor cases. (Tr. 1988, 1990, 1995).

This instruction does not mention that intent or specific intent is required to be proved with respect to Mr. Stanko. At best, the instruction provided that the actual actors who committed the offense must have acted with requisite intent. This is not, however, consistent with the requirements for conviction of either a specific or general intent offense. It allowed Defendant Stanko to be found guilty irrespective of his mental state and irrespective of whether he even knew of the alleged wrongdoing. This instruction, therefore, relieved the government of its obligation to prove beyond a reasonable doubt each element of the offense. The words actually spoken and given to the jury may well have led a reasonable juror to believe that no proof of Mr. Stanko's intent was necessary, but that a conviction could be based upon mere proof that Mr. Stanko held a responsible position to the issues out of which the charges arose.

The Court of Appeals opinion attempts to avoid the issue by stating that the instructions must be considered as a whole; and, that other instructions adequately covered the question of specific intent. However, the prosecution's theory throughout the case was that Defendant Stanko could be held responsible because he was the boss even if he did not actually participate in any actual wrongdoing. Therefore, this key instruction misinformed the jurors and cannot be amended or corrected by the other instructions.

A jury instruction that relieves the government of its obligation to prove each element of a felony offense charged is unconstitutional because it denies a defendant due process of law. Moreover, this instruction had the

effect of stripping Mr. Stanko of the presumption of innocence with respect to the issue of intent. The jury was deprived of its power to decide an essential factual element of the offense.[2]

The government requested, and the Court gave, Instruction 42 in the belief that it was authorized in by *United States v. Park*, 421 U.S. 658 (1975). Although *Park* did sanction giving an instruction nearly identical to the one given here, it did so only with respect to a *misdemeanor* offense where no criminal intent was required to be proven.

Normally, a violation of 21 U.S.C. § 676(a) is a misdemeanor, punishable by no more than one year in jail and a fine of $1,000. Two conditions turn the misdemeanor into a felony punishable by not more than three years in prison and a fine of $10,000. The first condition is an intent to defraud. Such intent was alleged in Counts III, IV, VI, VIII and XII of the indictment. The second condition which creates a felony under this statute is the "distribution or attempted distribution of an article that is adulterated." Such a distribution was alleged in Count IX of the indictment.

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[2] The pertinent part of 21 U.S.C. § 676(a) reads as follows:

> Any person, firm, or corporation who violates any provision of this Act for which no other criminal penalty is provided by this Act shall upon conviction be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if such violation *involves intent to defraud*, or any distribution or attempted distribution of an article that is adulterated (except as defined in Section 1(m)(8) of this Act), such person, firm or corporation shall be subject to imprisonment for not more than three years or a fine of not more than $10,000, or both.

The concept of vicarious liability was unknown to the common law. It was widely believed in this country and England that in order to be convicted of a crime one must be proven to have committed a prohibited act along with a "vicious will". *Morrisette v. United States,* 342 U.S. at 251.

One of the first cases to deal with the question of vicarious liability was *United States v. Dotterweich,* 320 U.S. at 277 (1943). *Dotterweich* was a prosecution of Buffalo Pharmacal Co. and its president Joseph H. Dotterweich for violating the Federal Food, Drug and Cosmetic Act by shipping adulterated drugs in interstate commerce. Buffalo was a jobber that purchased drugs from manufacturers, repacked them under its own label and sold them. The charges were based on § 301 of the Act, 21 U.S.C. § 331. Paragraph (a) prohibited "[t]he introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is adulterated or misbranded." It is further provided "Any person" violating this provision is guilty of a misdemeanor. 320 U.S. at 278. The question in that case was whether Dotterweich was "any person" within the meaning of the Act.

The Supreme Court held that vicarious criminal liability could be imposed for *misdemeanor* violations. The Court premised its conclusion on the notion that food and drug legislation is the kind of law where penalties serve as effective means of regulation, and. therefore, "dispense[s] with the conventional requirement for criminal conduct—awareness of some wrongdoing." 320 U.S. at 281. In deciding who could be prosecuted, the Court was careful to limit the application of this new rule to misdemeanors. It said:

> The statute (§ 303) makes "any person" who violates § 303(a) guilty of a "misdemeanor." It specifically defines "persons" to include "corporations." § 201(e) But the only way a corporation can act is through the individuals who act on its behalf.
>
> And the historic conception of a "misdemeanor" makes all those responsible for it equally guilty. *United States v. Mills,* 7 Pet. 138, 141 . . .

The Court's conclusion that Dotterweich could be found liable solely on the basis of bearing a responsible relationship to the issue was thus clearly based on the common law notion of misdemeanor, as opposed to felony, liability.

The Court itself read its construction of the statute as casting "the risk that there is no guaranty upon all who according to settled principles of criminal law are responsible for the commission of a *misdemeanor.*" (emphasis added)

Nothing in *Dotterweich* can be read as authorizing the application of this principle to felony liability. The Tenth Circuit opinion fails to address the *Dotterweich* opinion.

United States v. Park, 412 U.S. 664 (1975) raised the question whether the jury instructions given in the prosecution of a corporate officer under 21 U.S.C. § 331(k) were appropriate under *Dotterweich.*

Park was president and chief executive officer of Acme Markets, Inc., which was a retail food chain that had sixteen warehouses, one of which was in Baltimore, Maryland. Park worked at corporate headquarters in Philadelphia, Pennsylvania.

The government alleged that Acme and Park had allowed food to be stored in the Baltimore warehouse where it was accessible to rodents and their contamination, which caused the food to be adulterated in violation of 21 U.S.C. §§ 342(a)(3) and 331(k). These violations were misdemeanors. 21 U.S.C. § 333(a). They did not require proof of criminal intent.

The Company pleaded guilty, but Park went to trial. The trial judge instructed the jury that Park could be liable for violations even though he may not have participated personally in the acts. The Court of Appeals reversed, holding, in essence, that the instruction "might well have left the jury with the erroneous impression that Park could be found guilty in absence of 'wrongful action' on his part, and that proof of this element was required by due process". 421 U.S. at 666.

In reversing, the Supreme Court held that *Dotterweich* had sanctioned the imposition of misdemeanor criminal liability for corporate officers who held a responsible relationship to the situation out of which the charges arose. Again, however, the Court reiterated the limiting principle of *Dotterweich* that operates to control the statute from offending traditional notions of fair play and substantial justice.

> A limiting principle, in the form of "settled doctrines of criminal law" defining those who "are *responsible for the commission of a misdemeanor,*" *was available. In this context* the [Dotterweich] Court concluded, those doctrines dictated that the offense was committed "by all who . . . have . . . a responsible share in the furtherance of the transaction which the statute outlaws." (421 U.S. at 669)

The historical development of vicarious criminal liability demonstrates that it is founded on basic premises of criminal law that relate only to misdemeanors. No case or commentator seriously suggests that such liability should be imposed for felonies, which have always required proof of criminal intent. In fact, the contrary is true. Perhaps the most often cited discourse on the subject is Sayre, *Criminal Responsibility for the Acts of Another,* 43 Harv.L.Rev. 589 (1930). By way of summarizing the thinking underlying vicarious liability offenses, Sayre observed:

> As the decisions indicate, a sharp line must be drawn between true crimes involving serious punishments and petty misdemeanors involving only light monetary fines. Where the offense is in the nature of a true crime, that is, where it involves moral delinquency or is punishable by imprisonment or a serious penalty, it seems clear that the doctrine of respondeat superior must be repudiated as a foundation for criminal liability. For it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual; and in the last analysis the inarticulate, subconscious sense of justice of the man on the street is the only sure foundation of law. (43 Harv.L.Rev. at 717.)

These deep-rooted notions are reflected in *Dotterweich, Park* and all other reasoned cases that have considered the question.

Most telling is the fact that there are no reported felony cases in which vicarious criminal liability has been imposed. Indeed, there is no authority known to the Defendants that has approved an actual jail sentence on a vicarious liability theory, although at least one case held imprisonment in such cases was a violation of due pro-

cess. *Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825 (1959). Petitioners suggest that there is no authority for the jury instruction that was given when the consequences are the conviction of a "true crime", i.e., a felony. To hold otherwise would disregard the limiting principle upon which vicarious liability has been built, and, therefore, be contrary to existing law.

II. THE COURT'S DECISION AND OPINION APPROVES A LOCAL RULE WHICH IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

Following the trial defense counsel filed a motion for an evidentiary hearing or, in the alternative, for the trial court's permission to interview the trial jurors. This unusual motion was based upon the post-trial activities of the jurors. All of the jurors were requested by the media to give interviews. A number of the jurors gave interviews to a local television reporter. The news reports and interviews indicated for the first time that the verdict may not have been unanimous and that at least one juror did not candidly answer the court's *voir dire* questions. The request for a hearing alleged the following facts:

A. That Juror Randy Klein failed to disclose during *voir dire* examination that he had previously worked in a meat packing plant.

B. That a good number of the jurors were directly affected by the conduct of the media during the

trial. Some jurors actually noticed when a large number of reporters were or were not present during the testimony of various witnesses at trial.

C. That at least one juror reported that she believed Gary Waderich was a victim of circumstance.

D. That a number of jurors had mixed emotions about returning guilty verdicts against Gary Waderich.

E. That the jurors during their deliberations joined hands and prayed for Divine guidance during their deliberations.

Additionally, shortly after the trial Juror Shirley McLaughlin sent a letter to Waderich's defense counsel.[3]

The letter of Juror McLaughlin and the news reports raised some very serious factual questions. Was the jury's verdict as to the defendants unanimous? Did the jury rely

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[3] The letter stated:

"Dear Mr. McAllister:

I want to commend you on the *excellent* job you did defending Gary Waderich on the Cattle King trial. I was one of the jurors with many mixed emotions.

For me it was a very difficult decision to find Gary guilty on all seven counts. The first count, conspiracy, is such a harsh word and the way it reads legally was quite a big discussion for all of us.

I personally feel that Gary was a victim of circumstance. I also want you to know that all of our decision had nothing to do with the testimony of the "big three."

I know how much time and work you, Mr. Shea and Mr. Chaloupka put into the case and I'm hoping in my heart that Gary will not serve time in prison. He doesn't deserve that.

Good luck on your appeal for Gary.

Sincerely, s/Shirley McLaughlin."

upon any statements by Juror Klein concerning his previous employment in a meat packing plant? Did the jurors rely on extrinsic facts which were not admitted into evidence at trial? Were the jurors so affected by the media's coverage that one or more jurors actually reviewed a newspaper, television or radio report? Did the jury improperly rely on some type of religious or theological interpretation of the evidence? In light of these unanswered questions, defense counsel sought a hearing to interview the jurors. The District Court denied the request for a hearing shortly before imposing sentence on the Defendant. The trial court refused to hear or entertain oral argument on legal questions presented by the motion.

The Tenth Circuit Court of Appeals opinion totally ignored this serious problem. The Court simply commented, "In our view this is a trivial matter." The Court failed to address the constitutionality of the local rule. The opinion basically approves the rule because it approves of the fact that the Court refused to grant a hearing or make further inquiry of the jurors.

If the news reports were accurate that one juror, Randy Klein, told other jurors that he had previous work experience in a meat packing plant, a serious problem was presented. This information was not made known during *voir dire* examination by the trial court. Without a hearing there is no way to determine whether Juror Klein's previous work experiences were discussed during the jurors deliberations.[4]

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[4] Defense counsel had moved for permission to conduct the voir dire examinations as a method of neutralizing the prejudice created by pretrial publicity. The Court denied the request.

In *Consolidated Gas and Equipment Company of America v. Carver,* 257 F.2d 111 (10th Cir. 1958), the court during the course of *voir dire* asked whether or not any of the members of the jury panel were involved in any personal injury actions. One of the potential jurors in that case was involved in a personal injury action, and failed to disclose that fact to the court. Since the *Consolidated Gas* gas involved a personal injury action, a challenge for cause or a peremptory challenge could properly have been interposed against that juror. In passing on this state of affairs, the Tenth Circuit stated at page 115 of the opinion:

> Whether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency. And such deception and misleading have the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right.

The court went on to state at page 116:

> Since he was not a competent juror, the jury with his membership thereon was not a properly constituted tribunal. And upon discovery of the incompetency of the juror, the motion for relief from the judgment should have been sustained. . . True, the verdict was unanimous but that did not immunize it from attack upon the ground that the particular juror was not competent. The integrity of the verdict depended upon there being 12 competent jurors, not 11.

In *United States v. McCorkle,* 248 F.2d 1 (3rd Cir. 1957) *cert. denied* 78 S.Ct. 121 (1957), a defendant convicted of first degree murder sought a writ of habeas corpus. The ground urged for granting of the writ was that the defendant had been convicted by a jury, one of the

members of which had concealed that he had been a victim of a similar robbery. In granting the writ of habeas corpus, the court stated in the opinion:

> In a capital case at least, counsel should be able to rely on prospective jurors answering questions with candor and not be forced to deal with each talesman as a hostile, evasive witness . . . For that kind of trial the 14th Amendment insists on the most impartial tribunal the reasonable needs of society will permit.

The court added some concerns in its opinion which may be particularly applicable to this case:

> When the news finally did become public, there was a refusal to accept it for what it was, namely, a weightly prejudicial occurrence that may have destroyed a fair trial which cried out for correction . . . No policy is strong enough to prevent correction of errors of the nature outlined.

Appendix A of the Local Rules of the Colorado District Court states:

> "Without the prior permission of the judge to whom a case is assigned, during and after the trial of a case a lawyer connected therewith shall not communicate or cause another to communicate with any member of the jury."

The local rule in the District of Colorado totally precludes post verdict questioning of jurors without prior judicial approval.

The rule is ostensibly designed to maintain the integrity of a jury verdict and thus maintain faith in our system of justice. However, the lawyer's duty to respect the integrity of a jury verdict does not mean that lawyers "surrender their First Amendment rights at the court-

house door." *In Re Halkin,* 598 F.2d 176, 187 (D.C.Colo. Cir. 1979).

It is important to note that the defendants are not alleging that a *juror's* First Amendment rights are abridged by the local rule (see *United States v. Wilburn,* 549 F.2d 734 (10th Cir. 1977) but rather that the *attorney's* First Amendment rights were infringed. The local rule prohibits all questioning without some sort of previous permission. This clearly constitutes a prior restraint on free speech. *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). As a prior restraint, there is a heavy presumption against the rule's constitutionality. *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971).

The local rule provides that questioning *may* be permissible if approved by the presiding judge. No grounds are stated for obtaining judicial approval. No procedure is delineated. No guidelines govern how a judge determines whether questioning should be conducted and, if so, on what scale and to what degree. How an attorney can obtain "prior permission" and what he needs to show to obtain prior permission is totally unknown.

In *Gagliano v. Ford Motor Co.,* 551 F.Supp. 1077 (D. Kan. 1982), a local rule prohibited lawyers from communicating with jurors "unless authorized . . . upon formal application to the Court and hearing at which just cause shall be shown." The court held that while arguably a prior restraint, the rule was "not constitutionally deficient for that reason alone." 551 F.Supp. at 1079. In contrast, the local rule followed in this case is not only a prior restraint infringing upon a defendant's First Amendment

rights, but it also fails to provide any meaningful guidelines for an attorney who has a good faith belief that the jury verdict was improper or unlawful.

> "Where a vague statute 'abuts upon sensitive areas of First Amendment freedoms,' it 'operates to inhibit the exercises of those freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' "

Chicago Council of Lawyers, 522 F.2d 242, 249 (7th Cir. 1975), citing *Grayned v. City of Rockford,* 408 U.S. 104, 109; 92 S.Ct. 2294, 2299; 33 L.Ed.2d 222 (1972).

The deficiencies in the local rule are many and manifest. The rule impermissibly suppresses free speech by utilizing a prior restraint. The rule lacks clarity and precision. In the face of less restrictive alternatives, these deficiencies render the rule constitutionally infirm.

While a juror may not generally impeach his or her verdict, Rule 606(b) of the Federal Rules of Evidence provides that a juror may testify as to the validity of a verdict "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *See also, Maddox v. United States,* 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892):

> "A juryman may testify to any facts bearing upon the question of any extraneous influence, although not as to how far that influence operated upon his mind." (146 U.S. at 149)

The facts presented in the defendant's post-trial motion raised serious questions as to whether extraneous

prejudicial information was considered by the jury. Juror Klein's possible prejudicial information and the possibility of "divine inspiration" are serious allegations which need to be explored further in order to insure that the jurors did not base their decision on extraneous facts as opposed to the evidence presented in the trial.

> [W]hile the jury may leaven its deliberations with its wisdom and experience, in doing so it must not bring extra facts into the jury room . . . to the greatest extent possible, all factual material must pass through the judicial sieve . . . where the fundamental guarantees of procedural law protect the rights of the accused.

United States ex rel. Owen v. McMann, 435 F.2d 813, 818 (2d Cir. 1970) citing *United States v. McKinney,* 429 F.2d 1019 (5th Cir. 1970).

When there has been a showing warranting an investigation, barring all interviewing of the jurors is improper. *United States v. Moten,* 582 F.2d 654, 666 (2d Cir. 1978). The proper procedure would be for the court to closely supervise the questioning, not preclude it outright. *United States v. Moten, supra.* This procedure protects the defendant's Sixth Amendment right to a fair trial without subrogating the juror's right to be free from harassing questions.

A hearing to determine whether the jurors were improperly influenced by extraneous facts is mandated where there is a reasonable suspicion that the jury verdict may be tainted or improper. *United States v. Moten, supra.* Given the facts before the court relating to the allegations that Juror Klein may have withheld information during *voir dire* about his previous employment and Mrs. Mc-

Laughlin's letter, a reasonable suspicion was created that warranted, at a minimum, a hearing by the Court. This is especially so in light of the excessive amount of publicity surrounding the trial. The denial of either a hearing or juror interviews constituted a clear abuse of discretion.

In a number of instances, including this case, an attorney cannot be legally certain of juror misconduct without questioning a juror. A post-verdict request to interview jurors does not mandate the simple conclusion that an attorney is "shooting in the dark" to impeach a verdict. "Fishing expeditions" can easily be prevented by a rule which precludes harassing questions and provides for judicial supervision of the questions. Modifying the present rule does not open the flood gates to marauding defense attorneys. Attorneys for both sides have been allowed to interview jurors in the state courts for many years. The state court rule allows attorneys to exercise their First Amendment rights and effectively represent their clients.

The federal rule deprives litigants of their constitutional rights and allows for that exceptional case where a jury bases its decision on extraneous facts resulting in a miscarriage of justice.

III. THE COURT ERRED IN REFUSING TO GRANT A CHANGE OF VENUE IN THIS HIGHLY PUBLICIZED TRIAL.

The Tenth Circuit decision and opinion admitted that the defendants had a valid basis to seek a change of venue. The opinion states: "We will concede that there was considerable pretrial media publicity concerning the case" (p. 4). Nevertheless, the Court concluded that there was

no abuse of discretion by the District Judge in denying the motion for change of venue. The Court states that "Our study of the record made upon *voir dire* of the jury convinces us there was not actual prejudice." However, the Court study was incomplete. For reasons unbeknownst to the defendants, the transcript filed with the Court omitted the examination of three potential jurors, Catherine McDonald, Debbie Ingram and Shirley McLaughlin.

In a criminal proceeding, venue is more than a matter of procedure. Trial in the vicinty of an alleged crime protects the defendant from hardship and unfairness. *United States v. Jackson,* 482 F.2d 1167 (10th Cir. 1979).

Rule 21(a) of the Federal Rules of Criminal Procedure provides for transfer "if the court is satisfied that there exists in the district where the prosecution is pending, so great a prejudice against the defendant that he cannot obtain a fair trial . . . in that district."

This rule implements the defendant's Fifth and Sixth Amendment rights to a fair trial by an impartial jury. The excessive media coverage before, during and after this case the defendants' right to a fair trial.

The trial court has discretion in granting motions to transfer, and the appellate standard of review is abuse of discretion. Nevertheless, "[a]ppellate tribunals have the duty to make an independent evaluation of the circumstances." *Sheppard v. Maxwell,* 384 U.S. 333, 362 (1966), 86 S.Ct. 1407, 16 L.Ed.2d 600.

The circumstances surrounding the defendants' trial were as follows:

1. Negative publicity condemning the defendants was created by paid government witnesses such as Bruce

L. Ryan. Ryan volunteered to do a special television news series for a Denver television station.

2. The result of a survey conducted by Oedipus, Inc. demonstrated an attitude of public hostility against the defendants. The survey concluded that almost eighty percent (80%) of the potential jurors polled had formed an opinion that the Cattle King defendants were guilty prior to the trial.

3. The extensive media coverage created a sense of community outrage against the defendants.

All of these circumstances demonstrated that the defendants would be unable to obtain a fair trial and hence, the motion to transfer the trial to the District of Wyoming should have been granted.

The Tenth Circuit has acknowledged these concerns and has been particularly sensitive to the rights of the accused in this situation.

> Finally, we note some procedural safeguards which a trial judge can and should follow to assure the fair trial of an accused. Certainly, the sequestration of the jury is a significant prophylactic, but a judge should also be rather receptive to motions for venue change or trial continuance in order to minimize the effect of pretrial publicity. It is difficult to imagine an over-abundance of caution in this respect.

Corbett v. Patterson, 272 F.Supp. 602, 617 (D.Colo. 1967).

None of these safeguards were adopted by the District Court and the Court of Appeals refused to enforce this well-established law. The defendants consequently lost their right to a fair trial by being subjected to extensive media coverage of exceptional duration, coverage

which tainted the jury and virtually formed their opinions as to the defendants' alleged guilt.

In *Groppi v. Wisconsin,* 400 U.S. 505, 91 S.Ct. 490 (1971), 27 L.Ed.2d 571, the Supreme Court held a state statute preventing changes of venue in misdemeanor charges was invalid. In doing so, the Court discussed the alternatives to change of venue (i.e. continuance), approvingly, but noted:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." (400 U.S. at 507)

Pretrial publicity created an atmosphere at trial "corrupted by press coverage" adverse to the accused. *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

> "There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion, or manifestly biased by any influences operating . . . to poison judgment and prevent the freedom of fair action."

All these conditions existed weeks before the defendants were tried and throughout the trial. Despite a defense request the jurors were not sequestered and thus were exposed to the massive prejudicial media coverage. The jurors could not help but notice the dozen or more journalists and courtroom artists that attended the trial on a daily basis.

The motion for change of venue should have been granted and the Court of Appeals should have reversed the conviction and granted a new trial.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	Nos. 84-2435
v.	)	84-2436
	)	84-2454
CATTLE KING PACKING CO.,	)	85-2532
INC., RUDOLPH G. "BUTCH"	)	85-2533
STANKO, and GARY	)	85-2534
WADERICH,	)	
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
For the District of Colorado

(D.C. Nos. 84-CR-94, 84-CR-94-5, 84-CR-94-1, and 84-CR-94-2)

(Filed June 6, 1986)

Mark Wielga (Kevin Michael Shea of Roath & Brega, P.C., Denver, Colorado, and Roger C. Elletson, Cheyenne, Wyoming, with him on the brief), Denver, Colorado, for Cattle King Packing Co., Inc., and Rudolph G. "Butch" Stanko, Defendants-Appellants.

Robert T. McAllister of Dill, Dill & McAllister, Denver, Colorado, for Gary Waderich, Defendant-Appellant.

Charles H. Torres, Special Assistant U.S. Attorney (Robert N. Miller, U.S. Attorney and Douglas W. Curless, Assistant U.S. Attorney, Denver, Colorado, for Plaintiff-Appellee.

Before BARRETT, ANDERSON, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

In a fifteen count indictment, Cattle King Packing Co., Inc., a Colorado corporation, Rudolph G. "Butch" Stanko, Gary Waderich, and others were charged with various violations of the Federal Meat Inspection Act, 21 U.S.C. §§ 601-624, 661-680. Eight of the fifteen counts were dismissed prior to trial. In a joint trial, Stanko, Waderich, and Cattle King were convicted by a jury on all seven of the remaining counts. All three were sentenced and now appeal their respective convictions.

By way of general background, "Butch" Stanko, a resident of Scottsbluff, Nebraska, on or about June 1, 1981, started a packing plant in Adams County, Colorado, under the corporate name of Cattle King Packing Company, a Colorado corporation. Stanko was an officer and shareholder of the corporation. The operation continued until its closing on or about December 31, 1983. Gary Waderich, one of the three defendants, was a general sales manager of Cattle King and was primarily responsible for commercial sales of meat food products, as well as also being responsible for the daily operation of Cattle King.

The six substantive counts against the three defendants fall into three main categories: (1) the fraudulent

distribution of adulterated meat products; (2) the intentional circumvention of federal law requiring an inspection by a federal meat inspector of all shipments returned to Cattle King by dissatisfied purchasers; and (3) the fraudulent misbranding of meat shipments by stamping on the shipment a false production date. The defendants were also charged in a separate count, count 1, with conspiring to do, *inter alia,* the acts described in the six counts charging the substantive offenses.

It was the government's theory of the case that at the time Butch Stanko founded Cattle King, it was his intent to circumvent the provisions of the Federal Meat Inspection Act wherever possible, and that before returning to his home in Scottsbluff, Nebraska, in February, 1982, he set company policies and practices designed to violate federal law. These policies and practices he then passed on to his employees, including Gary Waderich, with instructions that such be followed. Although defense counsel would make much of the fact that Stanko returned to Scottsbluff, Nebraska, in February, 1982, and was not thereafter in the Adams County plant on a regular basis, it is nonetheless the government's position, in this regard, that Stanko, from Nebraska, monitored the packing operation by phone calls and occasional visits to the plant to make certain that the policies and practices which he had installed were in fact being followed. In support of its theory of the case, the government called some forty witnesses, including federal meat inspectors and several former employees of Cattle King.

In this court, Cattle King and Stanko are represented by the same counsel, and Waderich is represented by sep-

arate and different counsel. However, certain matters are urged by all three defendants. We will deal with these issues first.

I.

All defendants argue that the district court erred in refusing to grant a change of venue under Fed. R. Crim. P. 21 based on massive pretrial publicity which precluded a fair trial. In support of a pretrial motion for a change of venue, defendants offered a survey indicating that a high percentage of the people interviewed had heard about the case and that most believed the defendants to be guilty. We will concede that there was considerable pretrial media publicity concerning the case. Such, however, does not in and of itself dictate a change of venue. The critical issue is whether such publicity resulted in *actual* prejudice. *See* United States v. Hueftle, 687 F.2d 1305, 1310-11 (10th Cir. 1983). Our study of the record made upon *voir dire* of the jury convinces us that there was no actual prejudice.

It appears that eight of the fourteen jurors who heard the case had not previously heard or read about the case. As concerns the other six, the trial judge carefully explored, in each instance, the possible impact the pretrial publicity had on the jurors' ability to serve impartially. He concluded that each would decide the case on the basis of what he or she heard in the courtroom, and not what he or she had read in the paper or heard on TV. The grant, or refusal to grant, a motion for a change of venue in a criminal case rests within the sound discretion of the trial court, and an appellate court should not reverse a trial court's ruling on the matter unless an abuse of discretion plainly appears. United States v. Neal, 718 F.2d

1505, 1510-11 (10th Cir. 1983), *cert. denied,* 105 S. Ct. 87 (1984); United States v. Hueftle, 687 F.2d 1305, 1310-11 (10th Cir. 1983). We find no abuse of discretion.

II.

All three defendants claim that the evidence is legally insufficient to support their convictions on any of the seven counts. The standard of review for determining whether there is sufficient evidence to sustain a criminal conviction is as follows: The evidence at trial must be enough to convince a reviewing court that a rational fact finder could conclude that all necessary elements of the crime have been proven beyond a reasonable doubt. United States v. Powell, 469 U.S. 57, — (1984); United States v. Austin, 786 F.2d 986, 988 (10th Cir. 1986) (petition for rehearing pending). In determining whether the evidence is sufficient, it must be viewed in the light most favorable to the government. *Austin,* 786 F.2d at 988. Thus, in determining whether there is sufficient evidence to sustain the defendants' convictions, we only need look to see whether there is enough evidence in the record which, if believed, could lead to a rational conclusion that each element of each count had been proven beyond a reasonable doubt. We shall consider each count separately.

A.

Count 1 charges Cattle King, Stanko, and Waderich with conspiring with themselves and others to violate the Federal Meat Inspection Act. A description of what constitutes a conspiracy is found in our opinion in United States v. Kendall, 766 F.2d 1426 (10th Cir. 1985), *cert. denied,* 106 S. Ct. 848 (1986), to wit:

> A conspiracy is a combination of two or more persons acting in concert to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. The evidence must show circumstances to warrant a jury finding that the conspirators had a unity of purpose or a common design and understanding. . . . In a conspiracy prosecution, the critical inquiry is whether the circumstances, acts, and conduct of the parties are of such a character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists. . . . The conspiracy is complete "when one or more of the conspirators knowingly commit an act in furtherance of the object of the agreement." . . . The agreement need not be shown to have been explicit. It may be inferred from the facts and circumstances of the case.

Id. at 1431 (citations omitted) (dealing with whether there was sufficient evidence to sustain a conspiracy conviction). *See also* United States v. Buchanan, 787 F.2d 477, 487-88 (10th Cir. 1986) (also dealing with whether there was sufficient evidence to sustain a conspiracy conviction). Our study of the record convinces us that there is ample evidence to support the conviction of the three defendants on the conspiracy charge.

First, with respect to defendant Stanko, there is substantial evidence that he initiated the conspiracy. Illustrative thereof, and by way of example only, is the testimony of three former employees regarding instructions given them by Stanko at a time when Stanko was in charge of the day-to-day operation of the plant. Bruce Ryan testified that on one occasion when the packing plant was just getting started, a shipment of meat was rejected by an east coast consignee and returned to Cattle King "without the benefit of federal inspection." On this occasion, accord-

ing to Ryan, Stanko instructed Ryan and a fellow employee to come down on Sunday and "rework" the meat, but "don't let anybody else know about it." Ryan testified the shipment was "reworked" on a Sunday morning and readied for resale.

Larry Andrews, another former employee, testified that when Stanko was still running the day-to-day operation of the plant, Stanko gave him directions, which he followed, on how, when the "inspector wasn't around," to mix "inedible scrap" with edible meat and thereby enhance the poundage of the salable meat. Andrews also testified that he had discussions with Stanko regarding ways to get returned meat into the plant without federal inspection.

Similarly, Gary Tuck, another former employee, testified that in August or September 1981, Stanko established a firm policy that no federal meat inspector was to be allowed to inspect returned meat without Stanko or some other Cattle King official authorizing it.[1] Clearly such testimony is evidence of a conspiracy involving Stanko, Ryan, Andrews, and Tuck.

There is similar testimony involving Waderich, who was charged with carrying out the policies and practices set by Stanko. As set out in our discussion of the substantive counts immediately below, there is considerable testimony that Waderich was directly involved in all of

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[1] Almost a year later, Gary Tuck tried to back down from his testimony at trial that Stanko told him that no meat was to be inspected with Stanko's or some other officer's approval. This supposed recantation formed the basis for a new-trial motion by the defendants. As we discuss in more detail below, we find Tuck's alleged recantation to be highly suspect.

the substantive violations of the federal meat inspection laws. We find, therefore, that there is sufficient evidence showing a conspiracy to violate federal meat inspection laws involving Stanko, Cattle King and Waderich, to uphold their conspiracy convictions.

B.

Count 3 charged the defendants with causing, on February 12, 1983, a shipment of meat, which was returned to Cattle King by Western Grocers of Albuquerque, New Mexico, to be brought back into the plant without inspection by a federal meat inspector, and with an intent to defraud. Larry Andrews, a former Cattle King employee, who cooperated with the government investigation, testified that he and Gary Tuck, a co-employee, were instructed by Waderich to rebox the meat without inspection. Andrews went on to further testify that they were attempting to rebox the meat, which had not been inspected, when a government veterinarian came on the scene and demanded to know what was going on. When the matter was presented to Waderich, according to Andrews, Waderich disclaimed all knowledge. The meat in question was later thrown out. Still later, when Andrews and Waderich were discussing the matter, Waderich reportedly commented, "well, we tried, but we got caught."

The government veterinarian referred to in the preceding paragraph testified as a government witness and generally corroborated Andrews' testimony concerning the February 12 incident. Further, Tuck, Andrews' co-employee, testified in great detail concerning the meat returned from Western Grocers. Tuck testified that Wade-

rich directed the entire operation of bringing the meat back into the plant, avoiding federal inspection, and "reworking" the meat which included punching holes in bags of meat which were puffy due to bacterial gas buildup.

We find that there is sufficient evidence that Waderich directed the illegal circumvention of federal inspection when the Western Grocers' shipment was returned to sustain the convictions on count 3.[2]

C.

Counts 4 and 6 relate to a meat shipment to Nobel-Sysco in May, 1983. Count 4 charges the defendants with "misbranding" meat by falsely dating the packages. Bruce Ryan, an erstwhile employee of Cattle King, testified concerning the general practice of dating meat the day it was shipped, rather than the date of production. Specifically, he recalled and testified about the shipment to Nobel-Sysco, and the misdating, at Waderich's direction, of that particular shipment of meat.

Count 6 charged the defendants with causing the meat rejected by Nobel-Sysco to be brought back into the Cattle King plant, without federal inspection, and with the intent to defraud. The facts and circumstances surrounding the meat shipment returned by Nobel-Sysco strongly suggest that there was no inspection of the meat upon its return to Cattle King. Andrews testified that the bags containing the meat were "puffy" with gas caused by spoilage,

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[2] For further discussion on Stanko's guilt on this and the remainder of the substantive counts, see part III, *infra*. For further discussion on Cattle King's guilt on the substantive counts, see part IV, *infra*.

and that on instruction from Waderich, the bags were "poked" to let the gas escape, and the meat was then reshipped to Nobel-Sysco the next morning. Kim Gillespie, another Cattle King employee, testified that Waderich himself had told her that the Nobel-Sysco shipment had been returned in "bad condition" and that he, Waderich, had directed that the meat be "reworked" by punching holes in the bags, and that the meat was reshipped to Nobel-Sysco. Chris Ronson, an employee of Nobel-Sysco, testified that Nobel-Sysco marked the boxes of meat that it first rejected, and that the same boxes were reshipped to Nobel-Sysco, thus indicating that Nobel-Sysco received the same meat. Certainly the totality of the circumstances shows that there was no federal inspection of the meat returned from Nobel-Sysco.[3] We find, therefore, that there is sufficient evidence to sustain the defendants' convictions on counts 4 and 6.

D.

In count 9, the defendants were charged with shipping adulterated meat products to California Provisions on August 10, 1983. The evidence concerning this transaction is that the meat in question was first shipped by Cattle King to a company in North Carolina, which company rejected a big part of the shipment because of spoilage. The rejected meat was returned to a Cattle King storage facil-

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[3] The testimony of a number of witnesses shows that Cattle King employees were well-aware of the procedure established by the company to comply with federal law, that is, that returned meat was to be placed in a specific designated area for reinspection. None of the testimony concerning this incident indicates that the returned meat was handled in accord with the proper procedure.

ity in Nebraska, and from there shipped to California Provisions. Witnesses Coffey, Randall, Kim Gillespie, Wilson, and Stephenson testified about this particular transaction. For example, Wilson, the trucker, who picked up the meat sold to California Provisions from the Nebraska ice house, testified that the meat was packed in dilapidated boxes and that it "had a funny-looking color and it just—it had a bad smell to it." Also, Stephenson, an employee of S & L Meats, the company which purchased the Cattle King meat from California Provisions, testified that when he received the meat from the trucker, it looked bad, and when the meat was thawed, it was spoiled and unfit for human consumption.

Gary Woderich personally inspected the product and ordered that it be resold. It is, therefore, reasonable to conclude that if the shipment of meat to California Provisions was "adulterated," and there is evidence that it was, then Waderich sold this "adulterated" meat intentionally. We find the testimony sufficient to show that adulterated meat was shipped by Cattle King to California Provisions at the direction of Gary Waderich.[4]

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[4] On a related matter, Waderich challenges his conviction on Count 9 on the basis that Colorado was an improper venue for the trial on this count. He argues that none of the alleged crime took place in Colorado. Under the Constitution, as embodied in Fed. R. Crim. P. 18, an accused has a right to be tried in the federal district in which the crime was committed. However, under 18 U.S.C. § 3237, any crime "against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Under this statute, venue lies in any district used to commit the crime. United States v. Jackson, 482 F.2d 1167,

(Continued on following page)

E.

In count 12, the defendants were charged with preparing meat products from May 1, 1983, through June 30, 1983 with an intent to defraud, which products were adulterated in that plastic cry-o-vac tubes used for packaging the meat had been punched with holes to allow gas to escape. This particular count is referred to by the parties as the King Soopers transaction. In this regard, there was substantial evidence, through the testimony of Bruce Ryan, Larry Andrews, and Gary Tuck, that meat sold to King Soopers was returned because of spoilage, was "reworked," and then, according to witness Tuck, reshipped, all at the direction of Gary Waderich. We find sufficient evidence to sustain the convictions on count 12.

F.

In count 13, the defendants were charged with selling misbranded, that is, misdated, meat products on March 14, 1983, to Fairfield Farms in Capitol Heights, Maryland. Fairfield Farms is a subsidiary of the Marriott Corporation. The testimony of witnesses Ron Edelmann, a Marriott employee, and that of Andrews and Ryan, establishes, *prima facie,* that the meat was stamped as of the date of shipment, rather than the date of production as

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(Continued from previous page)

1178 (10th Cir. 1973), *cert. denied,* 414 U.S. 1159 (1974). The sale of the meat to California Provisions was made by telephone in Colorado by Kim Gillespie at the orders of Gary Waderich. Certainly the crime began in Colorado. Colorado, therefore, under 18 U.S.C. § 3237, is the proper venue for trying Count 9. *Accord* United States v. Zwego, 657 F.2d 248, 251 (10th Cir. 1981), *cert. denied,* 455 U.S. 919 (1982) (proper venue for making false statements ruled proper, *inter alia,* in place where statement originated).

required by Marriott. The fraudulent intent of Waderich is confirmed by Ryan's testimony. Ryan described one situation when Marriott did a quality control check of the Cattle King plant. To keep Marriott from discovering that Cattle King was stockpiling Marriott's meat, Waderich told Ryan to make sure that someone dated the boxes of meat that were already being stored in the cooler.

In sum, the facts and circumstances are such that, in our view, there is sufficient evidence to support the jury's verdicts on all the counts. There is little doubt that Cattle King's operation violated federal meat inspection law at about every turn. Cattle King employees shipped adulterated meat, misdated the meat so as to give the consignee an erroneous understanding as to the production date, and evaded federal inspection when rejected meat was returned to the plant. Cattle King employees also "reworked" the returned meat and resold it. Because this activity directly involved Gary Waderich, his challenge of the sufficiency of the evidence must clearly fail. As for the challenges of Stanko and Cattle King, they will be addressed in the next two parts of this opinion.

III.

Stanko formed Cattle King in June, 1981, and for about eight months thereafter was in charge, on a day-to-day basis, of the plant and its operation. It was during this time, according to government witnesses, that Stanko established the policies and practices of the company out of which the present proceedings arose. Stanko returned to his residence in Scottsbluff, Nebraska, in February, 1982, and though he kept in touch with the plant, the day-to-day supervision of the plant was turned over to others,

particularly Gary Waderich, who was instructed to follow the practices prescribed by Stanko, which included misdating of meat, shipping of adulterated meat, and by-passing federal inspection of meat returned to the plant by dissatisfied purchasers. Notwithstanding, counsel for Stanko would make much of the fact that Stanko returned to Scottsbluff, Nebraska, in February, 1982, and, in this regard, points out that all of the substantive charges, as opposed to the conspiracy charge, occurred after the date Stanko returned to Nebraska. Counsel would have us believe that Stanko was somehow insulated from transactions occurring in Adams County, Colorado, when he, Stanko, was in Nebraska. This, in our view, is an overly simplistic view of the matter. All defendants were charged, *inter alia,* with being aiders and abettors under 18 U.S.C. § 2, and the jury was instructed that whoever aids, abets, counsels, commands, induces, or procures the commission of a criminal act by another is himself punishable as a principal. The fact that Stanko was in Scottsbluff does not absolve him of the criminal acts, for example, of Waderich, which were committed pursuant to instructions from Stanko himself.

As a variation on his "I-was-in-Scottsbluff" defense, Stanko charges that the giving of Instruction No. 42 was error. Instruction No. 42, which is based upon the instruction at issue in United States v. Park, 421 U.S. 658 (1975), can, according to Stanko, only be used in misdemeanor cases. *Park,* however, cannot be read so narrowly. *Park* clearly shows that an instruction like No. 42 is proper when the defendant is a corporate officer, and the crime alleged is a violation of some law designed to insure that

food and drugs are safe. There is nothing in the *Park* decision limiting its scope to misdemeanors.

The applicability of *Park* to our case is readily apparent. Although the substantive crimes in *Park* involved violations of the Federal Food, Drug, and Cosmetic Act, not the Federal Meat Inspection Act, the criminal provisions of both are strikingly similar. Both make violations a misdemeanor while providing for the same stiffer felony penalty if any violation is committed with the "intent to defraud."[5] More important both laws were passed to insure that food sold to the American public is safe. In addition, the very issue resolved in *Park* was whether a nearly identical jury instruction to No. 42 was properly given in the trial of a president of a company engaged in the food business. *See* 421 U.S. at 665.

The rationale of the Supreme Court's decision in *Park* is based upon this premise: Companies that engage in the food business, and the people who manage them, have an affirmative duty to insure that the food they sell to the public is safe. *See id.* at 670-73. Accordingly, a corporate officer, who is in a "responsible relationship" to some activity within a company that violates federal food

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[5] The Food, Drug, and Cosmetic Act provides that notwithstanding the provision making a violation a misdemeanor, if someone "commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000 or both." 21 U.S.C. § 333(b). *See Park*, 421 U.S. at 666 n.10.

The Federal Meat Inspection Act provision under which Stanko was charged makes a violation a misdemeanor, "but if such violation involves intent to defraud . . . , [a person violating the Act] shall be subject to imprisonment for not more than three years or a fine of not more than $10,000, or both." 21 U.S.C. § 676(a).

laws, can be held criminally responsible even though that officer did not personally engage in that activity. *Id.* at 673-74. Consistent with the rationale of *Park,* Instruction No. 42 gave the jury the opportunity to decide whether Butch Stanko was responsible for Cattle King's violations of federal meat inspection laws. The jury found that he was.

The statute at issue in *Park* permits a felony sentence if the violation charged is committed with an "intent to defraud." In *Park,* however, the defendant was not charged with a felony, but rather with a misdemeanor. The issue of whether the defendant in *Park* could be convicted under the felony provision of that statute, therefore, was not before the Court. Instruction No. 42, therefore, without more, would not be sufficient to find Stanko guilty of a felony.

Instruction No. 42, nevertheless, is sufficient to put to the jury the issue of Stanko's criminal responsibility for Cattle Kings' meat inspection violations. So long as the jury was instructed that it must also find that Stanko had the "intent to defraud," the jury instructions were proper and Stanko's challenge on this basis must fail.

It is axiomatic that jury instructions are not to be read in isolation, but rather are to be considered as a whole. *Park,* 421 U.S. at 674. Instruction No. 45 specifically charges that for all counts except count 9, "the crimes

charged in this indictment require proof of specific intent before the defendants can be convicted."[6] Contrary to Stanko's arguments, Instruction No. 45 complements Instruction No. 42 rather than contradicts it. Moreover, each jury instruction of each substantive count except count 9 contains the charge that the jury must find that "the defendant acted with the intent to defraud." Each such instruction also charges that the jury is to evaluate "[t]he question [of guilt] as to each defendant considered separately." It is fair to conclude that a reasonable juror, so instructed, would believe that he or she must find that Stanko had the "intent to defraud" before finding him guilty of the felony charges. *See* Sandstrom v. Montana, 442 U.S. 510, 514 (1979). As discussed above, particularly in our discussion of the conspiracy count, there is sufficient evidence that Stanko had such intent.

In sum, we find no reversible error in the giving of Instruction No. 42. That instruction must be read in connection with all the instructions. We find that Instruction No. 42 can be used to put to the jury the issue of Stanko's responsibility for Cattle King's Meat Inspection Act violations. And, it can be used to find him guilty of a felony, so long as the jury was properly instructed, as it was in this case, that it must find that Stanko had the requisite "intent to defraud." In any event, this is not

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[6] Note that this language in Instruction No. 45 says "defendants." There were only three defendants tried, Stanko, Waderich, and Cattle King. It is unlikely that a reasonable juror would conclude that this instruction did not apply to Stanko. *See* Sandstrom v. Montana, 442 U.S. 510, 514 (1979) ("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.")

an instance where Stanko was in Scottsbluff, Nebraska, *not* knowing what his employees were doing in Adams County, Colorado. Rather, the evidence is that Stanko set in motion the very acts which were carried out, pursuant to direction, by his employees, clearly a form of aiding, abetting, ordering, commanding, or inducing. 18 U.S.C. § 2. Scottsbluff is not a shield for Stanko.

IV.

The trial court instructed the jury that Cattle King could be found guilty only if one of its agents committed the crime charged, and three other elements were met:

1. The agent was acting within the scope of his or her employment;
2. the agent was authorized to do the act;
3. the agent was motivated, at least in part, to benefit the corporation.

Jury Instruction No. 27. As discussed above, Gary Waderich, an officer of Cattle King, was personally responsible for the commission of all the substantive counts, and he is certainly guilty under the conspiracy charge. Given Waderich's position within Cattle King, there is no doubt that elements 1 and 2 are met. As for element 3, there also is no doubt that Cattle King benefitted by the commission of these crimes. The principal effect of all the crimes committed was that Cattle King reaped great economic rewards. Selling meat which should have been condemned, misdating boxes so that meat could be stockpiled and thus produced more cheaply, all directly benefitted Cattle King economically. There is, therefore, sufficient evidence that Cattle King, as a company, is also guilty of all of the above-discussed crimes.

V.

Stanko and Cattle King, but not Waderich, argue that their convictions should be reversed because of the admission of hearsay evidence in violation of Fed. R. Evid. 104 and 801(d)(2)(E). The testimony complained about is testimony concerning acts and statements made outside the presence of Stanko by co-conspirators in furtherance of the conspiracy. Under such cases as United States v. Andrews, 585 F.2d 961 (10th Cir. 1978) and United States v. Petersen, 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980), a trial court, prior to the admission of such testimony, must itself make a factual determination, *inter alia*, that other evidence shows a conspiracy between the declarant and the defendant. Counsel suggests that the trial court's finding in this regard is insufficient in that it was conclusory and not really factual. We disagree. The trial court in so many words found that there was sufficient, substantial, and independent evidence of a conspiracy between the defendants and others. The fact that the trial court did not pinpoint the evidence is not fatal. *See* United States v. Buchanan, 787 F.2d 477, 481-83 (10th Cir. 1986).

VI.

Stanko was sentenced to four years imprisonment on the conspiracy conviction, which is longer than the maximum sentence which could be imposed on any of the six substantive charges, i.e., three years. Counsel for Stanko argues that the legislative intent behind 18 U.S.C. § 371 does not contemplate imposition of a conspiracy sentence which is longer than that which could be imposed for the underlying substantive violation. We disagree. Under the

facts of this case, the conspiracy offense and the completed substantive offense are separate crimes and a separate sentence may be imposed in connection with each. Ianneli v. United States, 420 U.S. 770, 777-78 (1975); United States v. Davis, 578 F.2d 277, 280 (10th Cir. 1978). It has long been the rule that Congress has the power to provide for persons convicted of conspiracy a punishment more severe than that provided for persons actually committing the act. Clune v. United States, 159 U.S. 590, 594-95 (1895). And such, in our view, is the legislative intent behind 18 U.S.C. § 371 which fixes the maximum imprisonment for a conspiracy conviction at five years, unless the object of the conviction is only a misdemeanor.

In Hunsaker v. United States, 279 F.2d 111 (9th Cir.), *cert. denied,* 364 U.S. 819 (1960), the Ninth Circuit held that the penalty provided for in 18 U.S.C. § 371, i.e., a $10,000 fine or imprisonment for five years, or both, applied where the object of the conspiracy was not a misdemeanor and the penalty for the object of the conspiracy was a civil suit only. The Ninth Circuit explained that this apparent inconsistency necessarily results from the plain language of § 371:

> Whatever, incongruity there may be in imposing a greater penalty for a conspiracy to commit an offense against the United States which is neither a felony nor a misdemeanor than would be the penalty had the offense against the United States been a misdemeanor only, is a matter for Congress to consider. The language it used admits of no debate.

Id. at 113 (citation omitted). Imposing a four-year conspiracy sentence on Stanko when the underlying offenses are felonies is clearly within the scope of § 371.

VII.

All defendants assert that the trial court erred in either denying their request that they be allowed to question jurors, or, in the alternative, by refusing to conduct an evidentiary hearing concerning possible misconduct by the jury. At the time the verdicts were returned, the trial court polled the jurors on an individual basis and each agreed that he, or she, had returned guilty verdicts on all counts against all defendants.

After the jury was discharged from the case, the media interviewed certain jurors, and out of those interviews emerged the fact that one juror had previously worked in a meat packing plant, which fact had not been elicited in *voir dire* examination. Counsel argues that the trial court erred in not making inquiry into this matter. We disagree. This is not an instance where the juror gave an erroneous answer to *voir dire* inquiry. The present employment of the juror in question was that of truck driver. He was not asked if he had ever been employed in a packing plant, though he and the other prospective jurors were asked if any member of their family was presently working in a packing plant. The fact that the juror had at some prior time worked in a packing plant, which was not brought out in *voir dire,* does not justify a full-blown post-trial inquiry. Greenwood v. McDonough Power Equipment, Inc., 687 F.2d 338 (10th Cir. 1982), *rev'd,* 464 U.S. 548 (1984), *opinion on remand,* 731 F.2d 690 (1984) (effectuating Supreme Court decision, reversing earlier decision by this court, that supposed erroneous answer by one juror to material question on *voir dire* did not warrant granting a new trial. In our view, this is a trivial matter.

Another juror, sometime after she had been discharged from jury service, wrote a letter to counsel for Waderich, commending him for his excellent job of defending Waderich. She stated that she had "mixed emotions" about the matter, that she did not base her verdict on the testimony of former employees of Cattle King, and hoped that Waderich would not "serve time." In our view, the letter is rather innocuous and certainly insufficient to require the trial court to make inquiry of the juror. Jurors may, at times, feel sorry for a defendant even though they voted to convict the defendant of the crime charged. The fact of the former, however, does not in any wise vitiate the latter. We, therefore, affirm the trial court's decision refusing to conduct a hearing on the thin allegations of jury misconduct.

VIII.

Subsequent to their convictions and sentencing, defendants filed a motion for a new trial based on newly discovered evidence. The district court held an evidentiary hearing on the matters raised in the motion. At the conclusion of the hearing, the district judge, from the bench, denied the motion and detailed his reasons for so doing.

At the trial of this case, Gary Tuck, a former employee of Cattle King, testified as a government witness. He was one of several former employees of Cattle King so testifying. On July 30, 1985, Gary Tuck wrote a 23-page letter to Stanko, which counsel contends constituted a recantation by Tuck of his testimony at trial. The motion for new trial was based on both Tuck's July 30 letter

to Stanko and on alleged withholding of exculpatory materials.[7]

At the hearing on the motion for new trial, Tuck's July 30 letter to Stanko was received in evidence. At or about the time of the hearing on the motion for new trial, it was discovered that Tuck had also written a 3-page letter to Stanko on July 23, 1985. This letter was also received into evidence.

Three witnesses testified at the hearing on the defendants' motion for a new trial, including Gary Tuck and Kathy Miller, the latter having been married to Tuck when he was employed at Cattle King. At this hearing, "Butch" Stanko appeared both *pro se*, and, at the same time, was assisted by retained counsel. Stanko did not testify, as such, at the hearing, but he did conduct much of the examination of the three witnesses.

From the record, we learn that Tuck was arrested on an assault charge and placed in jail in Scottsbluff, Nebraska. A few days before he wrote his first letter to Stanko, Stanko visited Tuck in the Scottsbluff jail, and, as a result of that visitation, Tuck wrote the July 23 letter to Stanko. That letter commenced with a recitation that Tuck was surprised and appreciative of the fact that Stanko would take the time to seek him out. The July 23 letter closed with the following statement: "Butch, I don't know what I can do but if there is anything I can do to help, I will."

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[7] The alleged exculpatory materials are psychiatric records of Gary Tuck.

Stanko thereafter visited Tuck at least one more time in the Scottsbluff jail, and it was in this setting that Tuck wrote the letter of July 30, which triggered the filing of a motion for new trial.[8] This sequence of events leading up to the July 30 letter was viewed with some suspicion by the district court, a suspicion which we share.

Counsel for the defendants assert that Tuck's July 30 letter constitutes a full and complete repudiation of his testimony given at trial. Contrarily, the government argues that the July 30 letter is not a true recantation, and, in many respects, parallels Tuck's trial testimony. We need not resolve this dispute, inasmuch as Tuck testified, at length, at the hearing on the motion for new trial. At that time, Tuck testified that his testimony at trial was correct in all details, except one. The one exception, which the district judge did not accept, related to one statement made by Butch Stanko concerning Cattle King's policy for avoiding inspection of returned meat. Further, Tuck testified that, in fact, he was not "pressured" in any manner by government officials.

As indicated, Kathy Miller, an ex-wife at the time of the hearing, testified concerning certain statements made to her by Tuck concerning governmental "pressure," and she also stated that Tuck had told her on several occasions that Stanko had done nothing illegal. During the course of her interrogation, Kathy Miller stated that Tuck had undergone some psychiatric treatment in August and September, 1981. She added that Tuck, who had been

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[8] Counsel for the defendants, on August 5, 1985, took a sworn statement from Tuck in the Scottsbluff jail, in the course of which Tuck read his July 30 letter, verbatim.

married about six times, never could tell the truth, especially about his numerous affairs of the heart. Counsel, based on Miller's testimony, then orally asked for a new trial on the ground that the prosecution had withheld from defense counsel, contrary to the dictates of Brady v. Maryland, 373 U.S. 83 (1963), the fact that Tuck had received psychiatric treatment in August and September, 1981.

At the conclusion of the hearing, the district court denied the motion for a new trial and stated, in detail, its reasons for so doing. The district court found that the prosecution had no *Brady* material in its possession concerning any psychiatric treatment given Tuck. It is unclear whether the trial court based its ruling that there was no *Brady* material on the basis that the material itself was not exculpatory, or on the basis that the government did not have the material in its possession. In either case, we find that Tuck's psychiatric records, at best, had only marginal impeachment value, and that it was not error for the trial court to refuse to grant a new trial based upon any alleged failure of the government to turn the records over to the defense. United States v. Latimer, 780 F.2d 868, 870 (10th Cir. 1985) (when defendant only generally requests exculpatory material, appellate court will reverse only if omitted evidence creates a reasonable doubt that did not otherwise exist) (citing United States v. Agurs, 427 U.S. 97 (1976). *See also* United States v. Bagley, 105 S. Ct. 3375, 3380-85 (1985) (under view articulated by Blackmun, J., joined by O'Connor, J., or view articulated by White, J., joined by Burger, C.J., and Rehnquist, J., a defendant must show that withheld information, if disclosed, would lead to a different result).

As concerns the July 30 letter, the district court doubted that, standing alone, it would itself justify a new trial, but found that Tuck's testimony at the hearing overrode and controlled any possible statements to the contrary in his July 30 letter. In sum, we find no abuse of discretion by the district court when it denied the motion for new trial. In support of our decision, we refer to our two opinions in United States v. Ramsey. In *Ramsey I*, 726 F.2d 601 (10th Cir. 1984), the government's principal witness,[9] subsequent to trial, recanted. At trial, the witness had testified that the defendant in *Ramsey* hired him to destroy a building. After conviction, the witness executed an affidavit wherein he stated that the defendant had nothing to do with the destruction of the building. We reversed and remanded with the direction that the trial court conduct an evidentiary hearing into the matters raised in the motion for new trial. In so doing, we stated that the requirements for granting a new trial are as follows: " 'The newly discovered evidence must be more than impeaching or cumulative; it must be material to the issues involved; it must be such as would probably produce an acquittal. . . .' " *Id.* at 604 (quoting United States v. Allen, 554 F.2d 398 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977)).

On remand, the district court in *Ramsey* conducted an evidentiary hearing on the motion for new trial. The recanting witness[10] testified that the statements in his

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9 Tuck was an important witness, to be sure, but he was by no means the only witness offering critical testimony. The government called about 40 witnesses in its case-in-chief, including several other former employees of Cattle King.

10 The recantation in *Ramsey* was much more clear-cut than Gary Tuck's.

affidavit were incorrect, and that his testimony at trial was correct. The district court denied the motion for new trial, and in *Ramsey II,* 761 F.2d 603 (10th Cir. 1985), *cert. denied,* 106 S. Ct. 851 (1986), we affirmed. In so doing, we observed as follows:

> This case is riddled with recantations and reassertions. On the cold record it is entirely impossible for this court to determine which story is the true version. The district court judge, who took the evidence and personally observed the witness as he testified, was in a much better position than this court to determine whether, even after noting Mr. Jackson's frequent about-faces, his testimony was nonetheless sufficiently credible to support a jury verdict. The district court's determination that there was no valid recantation but merely another flip-flop by the witness adequately justifies a finding that there was no newly discovered evidence justifying a new trial. While such a precarious and vacillating witness is an unstable stand on which to base a conviction, we cannot say that the record justifies overturning the trial court's decision on petition for a new trial.

Id. at 604. The allegedly recanting witness in *Ramsey* was far more material than Gary Tuck. In this light, the district court did not err by refusing to grant a new trial based upon Tuck's alleged recantations.

CONCLUSION

For the above-noted reasons, we find the appellants' arguments without merit.

All judgments are affirmed.